

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

QUINTON P. BROWN,)	
)	NO. CV-08-5091-JPH
Plaintiff,)	
)	
v.)	
)	ORDER ON MOTION
ELDON VAIL, et al.,)	TO DISMISS
)	
Defendants.)	
)	
)	

Plaintiff Quinton P. Brown is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983, 42 U.S.C. § 1985(3), and 42 U.S.C. § 2000cc. Mr. Brown filed this action on February 9, 2009.

Before the Court are Defendants' May 1, 2009 motion to dismiss Defendants Eldon Vail, Greg Garringer, Jeff Uttecht, and Gary Friedman and their 12(b)(6) motion to dismiss the § 1983 claims regarding the First Amendment, Eighth Amendment, and Fourteenth Amendment. (Ct. Rec. 47-49.) Mr. Brown filed a reply memorandum on June 1, 2009. (Ct. Rec. 54.) Defendants filed a reply memorandum on June 5, 2009. (Ct. Rec. 55.) On June 18, 2009, the parties consented to the jurisdiction of the Magistrate Judge in this case. (Ct. Rec. 58.)

BACKGROUND

Plaintiff Quinton P. Brown, an inmate at the Washington State Penitentiary (WSP), complains of difficulty receiving food appropriate to his Jewish beliefs and a lack of responsiveness to his complaints regarding the food provided to him. Mr. Brown is a member of the Jewish faith. (Ct. Rec. 10 ¶. 1.) Because of his faith, he observes various dietary rules. (Id.) This includes eating only "kosher" foods¹. (Ct. Rec. 10 ¶ 2.) In addition to eating kosher on a daily basis, Mr. Brown restricts his diet to observe certain holidays throughout the year. Periodically Mr. Brown fasts.² During Passover, he eats a specific diet.³

¹ For food to be kosher, it must be prepared in a certain way. If the utensils used to prepare non-kosher foods come into contact with kosher foods, it renders the kosher food non-kosher. (See Ct. Rec. 10 ¶ 20-21.) Additionally, during the observance of Passover, foods must be "kosher-for-Passover," which it appears to be a more stringent form of kosher. (See Ct. Rec. 10 ¶ 39, 44.) Meat and dairy are not to be consumed together. (See Ct. Rec. 10 ¶ 67, 88-91.) Food cannot be cooked on the Sabbath, so a cold meal is consumed. (See Ct. Rec. 10 ¶ 92.)

² Mr. Brown observed the Fast of Tammuz on July 20, 2008. (Ct. Rec. 10, ¶ 69.) He planned to participate in the Fast of Tish B'Av from August 9, 2008 to August 10, 2008. (Ct. Rec. 10 ¶ 136). Mr. Brown also participated in a twenty-four hour fast for Yom Kippur on October 9, 2009. (Ct. Rec. 10 ¶ 95.) Because prisoners who are fasting cannot eat at normal meal times, they are provided with a "fast break meal," which is a sack meal that can be eaten after normal meal times. (Ct. Rec. 10 ¶ 69, 98.)

³ Mr. Brown believes that he must consume matzah (unleavened bread) during the seven days of Passover. (Ct. Rec. 10 ¶ 107, 113.) He also believes that it was necessary to participate in Seder, a special dinner that takes place on the first two nights of Passover. (Ct. Rec. 10, ¶ 115-124.) Additionally, inmates who observe Passover are given "kosher-for-Passover" meals. (Ct. Rec. 10, ¶ 39.)

1 In his complaint, Mr. Brown sets forth facts showing a pattern of
2 difficulty receiving food appropriate to his religious beliefs and
3 alleging the involvement of various officials. Mr. Brown provides an
4 extensive record of incidents in which his meals were not kosher and
5 DOC employees did not remedy the problem. (Ct. Rec. 10, ¶ 9, 11, 12,
6 14, 16-18, 20, 21, 24-28, 30, 31, 33, 35, 38, 40, 41, 43, 46, 48-51,
7 58-60, 65, 70-73, 77-80, 82, 83, 86-106.) Mr. Brown also alleges facts
8 showing that he does not receive his fast break meals or that these
9 meals are inadequate. (Cr. Rec. 10 ¶ 69, 95, 134, 137.) Similarly, he
10 puts forth facts showing that the Passover meals provided are either
11 inadequate or are not delivered on time. (Ct. Rec. 10 ¶ 32-44, 107-
12 131.) Mr. Brown also provides a detailed record of kites and
13 grievances he has filed in regards to his difficulty in receiving
14 appropriate food. (Ct. Rec. 10 ¶ 12, 13, 15, 19, 23, 64, 73, 93, 106,
15 110-112, 117-124, 126-128, 135-137.)

17 Mr. Brown also makes allegations that defendants not directly
18 involved with food service are implicated in this set of facts. He
19 concludes that Mr. Young, Grievance Coordinator at WSP has denied Mr.
20 Brown his "First Amendment right to file grievances" by censoring his
21 grievances. (Ct. Rec. 10 ¶ 139-141.) He also attempts to implicate Mr.
22 Vail, Mr. Uttecht, and Mr. Garringer in his § 1983 claim by alleging
23 that they failed to adequately train and supervise their employees.
24 (Ct. Rec. 10 ¶ 8, 143.) Mr. Brown lists Gary Friedman, chairman of
25 Jewish Prison Services International, as a defendant and puts forth
26

1 facts demonstrating that Mr. Brown's request to receive Seder dinner
2 was denied in reliance upon an e-mail from Mr. Friedman. (Ct. Rec. 10
3 ¶ 116.)

4 Mr. Brown's exact legal claims are difficult to decipher.
5 However, after a liberal reading of the Complaint and Mr. Brown's
6 reply memorandum, it would appear that he asserts the following
7 claims:

- 8 1. Denial of his First Amendment right to petition the
9 government for redress of grievances
- 10 2. Violation of the Eighth Amendment prohibition of cruel and
11 unusual punishment⁴
- 12 3. Denial of the Fourteenth Amendment right to equal protection
13 under the law
- 14 4. Conspiracy to violate his civil rights
- 15 5. Violation of the Religious Land Use and Institutionalized
16 Persons Act (RLUIPA)
- 17

18 The defendants have moved to dismiss Defendants Vail, Garringer,
19 Uttecht, Young, and Friedman, and the First Amendment, Eighth
20 Amendment, and Fourteenth Amendment claims pursuant to Fed. R. Civ. P.
21 12(b)(6). In Mr. Brown's reply brief, he moves for dismissal of the
22 Eighth Amendment claim without prejudice.
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24
25 ⁴ In Mr. Brown's reply memorandum, he moves to dismiss the Eighth
26 Amendment claim without prejudice. (Ct. Rec. 55, P. 49.) The court will
not address the Defendants' motion to dismiss the claim because the issue
is now moot.

LEGAL STANDARD

When considering a motion to dismiss, the Court must liberally construe the complaint in the plaintiff's favor and must take all the pleaded facts as true. Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 164 (1993). A motion to dismiss for failure to state a claim upon which relief can be granted should not be granted unless it appears beyond doubt that plaintiff can prove no set of facts in support of the claim that would entitle him to relief. See Hishon v. King & Spalding, 467 U.S. 69, 73 (1984) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). In applying this standard, the court must read the facts alleged in the complaint in the light most favorable to the plaintiff and accept the plaintiff's allegations as true. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

Although the pleadings need only give the defendant notice of the claims against him, the pleading standard is even more relaxed for pro se plaintiffs. The Supreme Court has instructed that the district court must liberally construe the complaint's allegations when the plaintiff is pro se. See Haines v. Kerner, 404 U.S. 519, 520 (1972). This is particularly true in civil rights cases. Ferdik v. Bonzelet, 963 F.2d 1258, 1261 (9th Cir. 1992).

However, the Court cannot accept a claim as valid if the facts alleged do not support the claim. Accordingly, the Court cannot "supply essential elements of claims that were not initially pled."

1 Ivey v. Board of Regents of the University of Alaska, 673 F.2d 266,
2 268 (9th Cir.1982). Nor can the court infer that a fact exists based
3 on conclusory allegations pled. Jones v. Community Redevelopment
4 Agency, 733 F.2d 646, 649 (9th Cir 1984). In litigation instigated by
5 prisoners, the Court shall move sua sponte to dismiss a complaint that
6 fails to state a claim. 28 U.S.C. § 1915(a)(2)(B)(ii). Prior to
7 dismissal, a pro se plaintiff must be given leave to correct the
8 complaint's deficiencies. McGuckin v. Smith, 974 F.2d 1050, 1055 (9th
9 Cir. 1992). However, the Court need not give such relief if it is
10 "absolutely clear that the deficiencies of the complaint could not be
11 cured by amendment." Franklin v. Murphy, 745 F.2d 1221, 1228 n.8 (9th
12 Cir. 1984(citing Stanger v. City of Santa Cruz, 653 F.2d 1257, 1257-58
13 (9th Cir. 1980)). See also Lopez v. Smith, 203 F.3d 1122 (9th Cir.
14 2000) (citing Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995)).
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16

17 DISCUSSION

18 I. SECTION 1983 FIRST AMENDMENT CLAIM AS TO PRISON GRIEVANCE SYSTEM

19 Mr. Brown appears to claim that the defendants deprived him of
20 his First Amendment right to petition the government for redress. In
21 his complaint, Mr. Brown states that, despite submitting various
22 kites and formal grievances, "little to no action has been undertaken
23 by: [sic] Eldon Vail, Greg Garringer and Jeffrey A. Uttecht to correct
24 their subordinates' continued deprivation of Browns' exercise of
25 religion." (Ct. Rec. 10 ¶ 8.) Defendants argue that Mr. Brown has
26

1 failed to state a claim because inmates do not have a constitutional
2 right to a prison grievance system (Ct. Rec. 48 P. 12.) In Mr. Brown's
3 reply memorandum, he asserts that prisoners do have a First Amendment
4 right to file prison grievances.

5 The First Amendment of the United States Constitution provides
6 that Congress shall not abridge the people's right to petition the
7 government for the redress of grievances. U.S. Const., Amend. I. A
8 person retains their First Amendment rights despite being
9 incarcerated. O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987).
10 Because a prisoner's ability to access the courts depends on his
11 access to a prison grievance system, a prisoner may seek relief under
12 § 1983 if prison authorities act to chill the filing of grievances.
13 See Bradley v. Hall, 64 F.3d 1276, 1279 (9th Cir. 1995). However,
14 "[t]here is no legitimate claim of entitlement to a [prison] grievance
15 procedure." Mann v. Adams, 855 F.2d 639 (9th Cir. 1988). Because there
16 is no legitimate claim of entitlement to a grievance procedure, there
17 is no "protectable right" to a grievance procedure. Id., (citing
18 Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442
19 U.S. 1, 7 (1979)). Accordingly, although a prisoner may seek relief if
20 prison authorities act to chill the prisoner's filing of grievances,
21 there is no relief for the lack of a grievance system or failure to
22 follow grievance system procedures.
23
24

25 Mr. Brown has not stated a claim for which relief can be granted
26 regarding a "First Amendment right to file grievances." Mr. Brown is

1 correct in stating that Bruce v. Ylst, 351 F.3d 1283 (9th Cir. 2003),
2 refers to a "First Amendment right to file grievances." Id. at 1288.
3 However, the complete sentence reads: "Bruce alleges that prison
4 officials violated his First Amendment right to file grievances." Id.
5 Because this is a statement of Mr. Bruce's claim and not a holding of
6 the Court, Mr. Brown's reliance on this case is misplaced. Moreover,
7 Mr. Bruce alleges he suffered retaliation for filing grievances, which
8 is actionable under § 1983. For these reasons, this Court declines to
9 adopt Mr. Brown's reasoning.

10
11 This Court also holds that Mr. Brown can prove no set of facts
12 supporting a § 1983 claim relating to grievances. To state a § 1983
13 claim relating to the prison grievance system, the facts pled must
14 show retaliation for filing grievances. Mr. Brown pleads no facts
15 demonstrating that prison authorities retaliated against him in
16 response to his filing of grievances. Moreover, although Mr. Brown was
17 injured on some level, he has suffered no injury for which there is a
18 legal remedy.⁵ Because there is no legal right to a prison grievance
19 system and because Mr. Brown was not retaliated against for using the
20 grievance system, Mr. Brown's claim relating to the grievance system
21 is dismissed without leave to amend.
22

23
24 ⁵ Retaliation may result in a First Amendment claim in which the
25 injury asserted is the chilling effect on the filing of grievances. Hines
26 v. Gomez, 108 F. 3d 265, 269 (9th Cir. 1997). Mr. Brown filed twelve
grievances in a fourteen month period, as well as numerous kites. (See
Ct. Rec. 10 ¶ 12, 13, 23, 34, 50, 52, 54, 66, 69, 93, 110, 118, 124.) The
pattern of filing indicates no chilling effect.

1 Additionally, Defendant Young shall be dismissed. The only facts
2 and allegations pled relating to Mr. Young were facts pled in support
3 of the First Amendment claim and the Eight Amendment claim.⁶ (See Ct.
4 Rec. 10. ¶ 120-124, 139-141) Because both of these claims are
5 dismissed, Mr. Young is dismissed without prejudice.

6 II. SECTION 1983 FOURTEENTH AMENDMENT EQUAL PROTECTION CLAIM

7 In the complaint, Mr. Brown "seeks judicial relief under [the
8 Fourteenth Amendment]. (Ct. Rec. 10 145.) In his reply memorandum, he
9 clarifies that he alleges a violation of his right to equal
10 protection. (Ct. Rec. 55 ¶ 26.) The Defendants move to dismiss this
11 claim because prisoners are not a protected class and because Mr.
12 Brown failed to allege intent to discriminate. (Ct. Rec. 47 P. 11.)

13 Because it can be inferred that Mr. Brown belongs to a protected
14 class, the Court will not grant the Defendants' motion to dismiss on
15 the basis that prisoners are not a protected class. "'The first step
16 in equal protection analysis is to identify the [defendants']
17 classification of groups.'" Freeman v. City of Santa Ana, 68 F.3d
18 1180, 1187 (9th Cir. 1995) (citing Country Classic Dairies, Inc. V.
19 State of Montana, Dep't of Commerce Milk Control Bureau, 847 F.2d 593,
20 596 (9th Cir. 1988)). The defendants argue that Mr. Brown's equal
21 protection claim should be dismissed because prisoners are not a
22
23
24

25 ⁶ These statements may also have related to the alleged Eighth
26 Amendment violation because Mr. Brown states that Mr. Young caused
"irreparable harm; [sic] hunger, pain, and weight loss." (Ct. Rec. 10,
¶ 140.)

1 suspect class. (Ct. Rec. 47 P. 12.) Although the Ninth Circuit has not
2 specifically addressed whether prisoners are a suspect class⁷, there is
3 no need to decide this issue because Mr. Brown's complaint is
4 sufficient to support an inference Mr. Brown is a member of a
5 protected class by virtue of his religion.

6 Although an amendment would be appropriate to clarify to which
7 protected class Mr. Brown belongs, it is not necessary⁸ because Mr.
8 Brown failed to allege discriminatory intent. "To state a claim under
9 § 1983 for a violation of the Equal Protection Clause of the
10 Fourteenth Amendment a plaintiff must show that the defendants acted
11 with intent to discriminate against the plaintiff based upon
12 membership in a protected class." Lee v. City of Los Angeles, 250 F.3d
13 668, 686 (9th Cir. 2001) (quoting Barren v. Harrington, 152 F.3d 1193,
14 1194 (9th Cir. 1998)). To show that the defendant acted with intent to
15 discriminate against the plaintiff, the plaintiff must allege that the
16 defendants' acts were motivated by discriminatory animus. Id. Alleging
17 facts that prove that the defendants acted knowingly or that the
18 defendants acted with deliberate indifference is not sufficient to
19

21 ⁷ The defendants cite to three other circuits' which have found that
22 prisoners are not a suspect class. (Ct. Rec. 47 P. 12.)

23 ⁸ Mr. Brown pleads that he "holds a sincere belief in and is an
24 adherent to the religious tenets of Judaism." (Ct. Rec. 10 ¶ 1). In his
25 reply memorandum, Mr. Brown also alleges that Mr. Friedman, Chairman of
26 Jewish Prison Services International, discriminated against him due to
"racial heritage" (Ct. Rec. 53 ¶ 13.) Because Mr. Friedman leads a Jewish
service organization, this discrimination appears to be based on Mr.
Brown's membership in a race other than what some might consider the
"Jewish Race."

1 support an equal protection claim. See Id. at 684. Similarly,
2 "[v]erbal harassment or abuse . . . is not sufficient to state a
3 constitutional deprivation under 42 U.S.C. § 1983." Oltarzewski v.
4 Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987) (quoting Collins v. Cundy,
5 603 F. 3d 825, 827 (10th Cir. 1979)). Neither is a "showing that
6 different persons are treated differently" sufficient, "without more,
7 to show a denial of equal protection." Griffin v. County School Bd. of
8 Prince Edward County, 377 U.S. 218, 230. However, if words are coupled
9 with disparate impact, this can allow for an inference of
10 discriminatory animus. See Sischo-Nownejad v. Merced Community College
11 Dist., 934 F.2d 1104, 1112 (9th Cir. 1991).

12
13 This Court holds that Mr. Brown failed to state an equal
14 protection claim because he did not allege discriminatory intent and
15 no additional facts could be pled to support a claim of discriminatory
16 intent. Mr. Brown alleges DOC officials acted with "actual malice,
17 willful/wanton [sic] indifference too [sic] and deliberate disregard
18 for Brown's known - [sic] statutory and constitutional rights." (Ct.
19 Rec. 10 ¶ 142). The facts he produces tend to support the claim that
20 certain DOC employees acted knowingly or with deliberate indifference.
21 However, these mental states do not rise to the same level as
22 discriminatory intent. Because neither the facts nor the allegations
23 pled can support a claim of an equal protection violation, Mr. Brown's
24 Fourteenth Amendment claim is dismissed without leave to amend.

25
26 III. WHETHER FRIEDMAN ACTED UNDER "COLOR OF LAW"

Mr. Brown includes Mr. Friedman as a defendant. The defendants
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1 argue that Mr. Friedman should be dismissed because he did not act
2 under color of law. Mr. Friedman is the chairman of Jewish Prisoner
3 Services International. He is not a prison chaplain. (Ct. Rec. 53 ¶
4 12.) Chaplain Alden denied Mr. Brown's request to receive Seder
5 dinners in reliance on an e-mail sent from Mr. Friedman. (Ct. Rec. 10
6 ¶ 116.) As stated above, § 1983 applies to those acting under color of
7 law. RLUIPA states that "no government shall impose a substantial
8 burden on the religious exercise of a person residing in or confined
9 in an institution . . . unless the government demonstrates that
10 imposition of a burden on that person (1) is in furtherance of a
11 compelling government interest; and (2) is the least restrictive means
12 of furthering that compelling governmental interest." 42 U.S.C. §
13 2000-5(4)(A)(iii). Included in RLUIPA's definition of "government" is
14 "any other person acting under color of State law." 42 U.S.C. § 2000-
15 5(4)(A)(iii).

17 For a person to act under color of law, 'the alleged infringement
18 must be fairly attributable to the government.' Sutton v. Providence
19 St. Joseph Medical Center, 192 F.3d 826, 835 (9th Cir. 1999) (citing
20 Lugar v. Edmonson Oil Co., 457 U.S. 952 (1981)). For an infringement to
21 be fairly attributable to the government, two requirements must be
22 met. Id. The first requirement is that the deprivation "must be caused
23 by the exercise of some right or privilege created by the [government]
24 or a rule of conduct imposed by the [government]." Id. The defendants
25 do not dispute that the first requirement is met.
26

The second requirement is that "the party charged with the
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1 deprivation must be a person who may fairly be said to be a
2 [governmental] actor." Id. A private person is presumed not to be
3 acting under the color of law. Id. Although various tests can be used
4 to determine whether a person is a state actor, there is no "specific
5 formula." Id. The defendants acknowledge that there is no Ninth
6 Circuit case law on whether a chaplain is acting under color of law
7 when he provides his services in a state prison. However, the
8 defendants do point to Eighth Circuit authority that holds a prison
9 chaplain does not act under color of law (Ct. Rec. 48 P. 16.) See
10 Montano v. Hedgepeth, 120 F. 3d 844 (8th Cir. 1977). Although this
11 authority is not binding, this Court finds the Eighth Circuit's
12 reasoning persuasive. In Montano, the Court relies heavily on Polk
13 County v. Dodson, 454 U.S. 312 (1981), in which the Supreme Court held
14 that a county public defender was not acting under color of law
15 because "the job is marked by 'functions and obligations in no way
16 dependent on state authority.'" 120 F.3d at 849 (citing Polk, 454 U.S.
17 at 318). By using this "functional approach," the Court in Montano
18 determined that a prison chaplain "even if a full-time state employee,
19 is not a state actor when he engages in inherently ecclesiastical
20 functions." 120 F.3d at 850.

22 This Court holds that Mr. Friedman is not a state actor. Mr.
23 Brown pleads that Chaplain Alden denied Mr. Brown's request to
24 participate in Seder dinner in reliance on an e-mail authored by Mr.
25 Friedman. (Ct. Rec. 10 ¶ 116.) Although it is only alluded to in the
26 complaint, Mr. Brown clarifies in his reply memorandum that Mr.

1 Friedman determined that Mr. Brown was "'not Jewish' according to
2 Orthodox interpretation of . . . Jewish law." (Ct. Rec. 53 ¶ 13.)
3 Interpreting Jewish law is an ecclesiastical function, and thus, not a
4 function of the State. Because Mr. Friedman was performing an
5 ecclesiastical function, he was not a state actor in performing this
6 function. Moreover, Mr. Friedman is "not a 'prison chaplain.'" (Ct.
7 Rec. 53 ¶ 12.) Because he is not a state employee, his connection to
8 the state for purposes of acting under color of law is even more
9 tenuous than the chaplain in Montano. For these reasons, the Court
10 dismisses Mr. Friedman without leave to amend.
11

12 IV. SECTION 1985(3) CLAIMS

13 Mr. Brown seeks relief under 42 U.S.C. 1985(3). The pertinent
14 part of the statute reads:

15 If two or more persons in any State or Territory conspire .
16 . . for the purpose of depriving, either directly or
17 indirectly, any person or class of persons of the equal
18 protection of the laws, or of equal privileges and
19 immunities under the laws . . . the party so injured or
deprived may have an action for the recovery of damages
occasioned by such injury or deprivation, against any one or
more of the conspirators. 42 U.S.C. 1985(3).

20 The elements of a 42 U.S.C. 1985(3) action are: (1) a conspiracy; (2)
21 for the purpose of depriving a person of the equal protection of the
22 laws; (3) an act in furtherance of the conspiracy; (4) whereby a
23 person is either injured in his person or property or deprived of a
24 right or privilege of a United States citizen." Mustafa v. Clark
25 County School Dist, 157 F.3d 1169, 1181 (9th Cir. 1998).
26

Although the defendants do not seek to dismiss on this claim, the
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1 Court holds that no set of facts can support a claim of conspiracy to
2 violate Mr. Brown's constitutional rights. Mr. Brown alleges that Sgt.
3 Serven stated "it's a conspiracy to deny you, [sic] your meal." (Ct.
4 Rec. 10 ¶ 81.) Because this fact must be taken as true, the first
5 element is satisfied. The pattern of Mr. Brown not receiving kosher
6 food supports the element of acting in furtherance of the conspiracy.
7 Additionally, he alleges that he was harmed. (Ct. Rec. 10 ¶ 7, 8,
8 140.) However, Mr. Brown must allege some facts that support the
9 element of conspiracy and that the plaintiffs had discriminatory
10 animus. As stated above, the Court holds that no set of facts can be
11 brought to support the discriminatory animus element of the § 1983
12 equal protection claim. The Court found above that there was no
13 discriminatory animus. The same reasoning applies as to why Mr. Brown
14 would be unable to offer any facts proving discriminatory animus of a
15 conspiracy. Accordingly, the § 1985 claim is dismissed without leave
16 to amend.

18 V. MOTION TO DISMISS DEFENDANTS VAIL, UTTECHT, AND GARRINGER

19 The defendants also move to dismiss Mr. Vail, Mr. Uttecht, and
20 Mr. Garringer based on the Eleventh Amendment and the prohibition
21 against § 1983 liability based on respondeat superior. Because the §
22 1983 claims have been dismissed, the respondeat superior argument is
23 moot. However, Mr. Brown's RLUIPA claim remains. As stated above,
24 RLUIPA prohibits actions of the "government" which place a substantial
25 burden on an inmate's exercise of religion. 42 U.S.C. § 2000cc-1(a).
26 In addition to those "acting under color of law," RLUIPA applies to

1 "(i) a State, county, municipality, or other governmental entity
2 created under the authority of a State," and "(ii) any branch,
3 department, agency, instrumentality, or official of an entity listed
4 in clause (i). . ." 42 U.S.C. § 2000cc-5(4)(A). Because these
5 defendants may be held liable under RLUIPA, they are not dismissed.

6 The Eleventh Amendment states, "The judicial power of the United
7 States shall not be construed to extend to any suit in law or equity,
8 commenced or prosecuted against one of the United States by citizens
9 of another State, or by Citizens or Subjects of any Foreign State."
10 U.S. Const., amend XI. In addition, a state cannot be sued by a
11 citizen of that state in federal court. Will v. Michigan Dep't of
12 State Police, 491 U.S. 58, 70 (1989). The fact that the state is not a
13 named party in an action does not necessarily mean that the state is
14 not a party. Leer v. Murphy, 844 F.2d 628, 631 (9th Cir. 1988). If
15 damages must be paid from the state treasury, then the state is the
16 real party in interest. Because a lawsuit is brought "against a state
17 official in his or her official capacity is not a suit against the
18 official but rather is a suit against the official's office," "it is
19 no different from a suit against the State itself." Will, 491 U.S. 58
20 at 71.

22 Although a plaintiff cannot seek damages from the state, he may
23 get injunctive relief from state officials. A suit against state
24 officials is not a suit against the state when injunctive relief is
25 sought. Ex Parte Young, 209 U.S. 123, 152 (1908). Accordingly, the
26 Eleventh Amendment does not bar a prisoner from seeking injunctive

1 relief in a RLUIPA claim against prison officials. Mayweathers v.
2 Newland, 314 F.3d 1062, 1068 (9th Cir. 2002).

3 Plaintiff brings suit against all defendants, including Mr. Vail,
4 in their official capacity and as individuals. One can look to RCW
5 72.02 and WAC 137-04-020 to see that DOC is an arm of the State of
6 Washington. Because all of the remaining defendants are DOC employees,
7 any judgment against them in their official capacities would be paid
8 by the State of Washington. Because the State of Washington is the
9 real party in interest, Mr. Brown cannot seek damages from any of the
10 DOC-employed defendants in their official capacity. Accordingly, the
11 defendants' motion as to Mr. Vail is granted as to all defendants
12 employed by DOC only so far as Mr. Brown is seeking damages. Mr. Brown
13 may still seek prospective injunctive relief against Mr. Vail, Mr.
14 Garringer, Mr. Uttecht, and the other defendants employed by DOC.

15 Mr. Brown also brings suit against all defendants in their
16 individual capacity. It appears that only one other court in the Ninth
17 Circuit has addressed the issue of whether state officials are
18 entitled to qualified immunity from RLUIPA liability. See Shilling v.
19 Crawford, 536 F.Supp.2d 1227, 1234 (D.Nev. 2008). That Court relied on
20 the Eleventh Circuit's holding that state officials being sued as
21 individuals have qualified immunity from RLUIPA. See Smith v. Allen,
22 502 F.3d 1255, 1275 (11th Cir. 2007). This Court too finds the
23 Eleventh Circuit's reasoning persuasive and holds that these state
24 officials have qualified immunity from RLUIPA in this suit.
25
26

Individuals who are employed by the State have not agreed to
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1 abide by RLUIPA in exchange for Federal financial assistance. Congress
2 can achieve objectives not necessarily within its enumerated powers
3 "through the use of the spending power and the conditional grant of
4 federal funds." South Dakota v. Dole, 483 U.S. 203, 207 (1987). RLUIPA
5 applies to "a program or activity that receives Federal financial
6 assistance." 42 U.S.C. § 2000cc-1(b)(1). Although RLUIPA may exceed
7 Congress' power under the Spending clause, "Congress' condition
8 stands," and "States subject themselves to that condition by
9 voluntarily accepting federal funds." Cutter v. Wilkinson, 544 U.S.
10 709, 732-733 (2005). The State of Washington may willingly accept
11 federal funds in exchange for abiding by RLUIPA. However, its
12 individual employees do not. This Court will not hold them accountable
13 for agreements into which the State of Washington may enter. Because
14 of this, the defendants in their individual capacity are entitled to
15 qualified immunity.
16

17 CONCLUSION

18 For the reasons discussed above, it is **ORDERED** that the
19 defendants' motions to dismiss Mr. Brown's 42 U.S.C. § 1983 claims as
20 to First Amendment, Eighth Amendment, and Fourteenth Amendment (Ct.
21 Rec. 47) are **GRANTED** and the defendants' motion to dismiss Defendant
22 Friedman (Id.) is **GRANTED**. The defendants' motion to dismiss
23 Defendants Vail, Garringer, and Uttecht (Id.) is **GRANTED** as to Mr.
24 Vail, Mr. Garringer, and Mr. Uttecht as individuals, but **DENIED** as to
25 as to these defendants in their official capacity. It is further
26

1 **ORDERED** that Mr. Brown's 42 U.S.C. § 1985(3) claim is **DISMISSED** and
2 that the remaining individual defendants are **DISMISSED**. Because Mr.
3 Brown was unable to support his claims with the extensive facts pled,
4 it is clear to this Court that no amendments would cure the
5 deficiencies in his complaint. Therefore, the above claims are
6 dismissed without leave to amend.
7

8 Mr. Brown may proceed on the RLUIPA claim seeking injunctive
9 relief from the remaining defendants in their official capacity.

10 The District Court Executive is directed to enter this Order and
11 forward copies to counsel and to Petitioner.

12 **IT IS SO ORDERED** THIS **28** DAY OF JULY, **2009**.

13
14 s/ James P. Hutton
15 JAMES P. HUTTON
16 U.S. Magistrate Judge
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